

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:05-cv-00329-GKF-PJC
)	
TYSON FOODS, INC., <i>et al.</i>)	
)	
Defendants.)	
)	

**DEFENDANTS' JOINT MOTION TO STRIKE JURY DEMAND
AND INTEGRATED BRIEF IN SUPPORT**

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The issues remaining for trial in this case are matters that are appropriately tried to the bench, rather than to a jury. Conducting a bench trial will conserve substantial resources for the parties, the Court, and the potential jurors. Accordingly, pursuant to Federal Rule of Civil Procedure 38, Defendants hereby request that the Court strike the jury demand in Plaintiffs' Second Amended Complaint ("SAC") to clarify that this matter will be tried to the Court.

Because the parties and the Court would otherwise address numerous issues relating to jury selection, voir dire, and jury-related motions in limine in the weeks before trial, Defendants respectfully request expedited consideration of this motion.¹

BACKGROUND

In the SAC, Plaintiffs pled 10 counts and requested a jury trial. *See* Dkt. No. 1215 (July 16, 2007). As the Court recently summarized, the SAC sought:

[R]ecovery of response costs and natural resource damages pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 et seq. (Counts 1 and 2); injunctive relief and civil penalties under the Solid Waste Disposal Act ("SWDA" [also known as RCRA]), 42 U.S.C. §6972 et seq. (Count 3); damages and injunctive relief under Oklahoma's law of nuisance (Count 4); damages and injunctive relief under federal common law of nuisance (Count 5); damages and injunctive relief under state common law of trespass (Count 6); civil penalties and injunctive relief for violation of state environmental and agricultural statutes and regulations (Counts 7 and 8); and claims for restitution and disgorgement of profits under state common law of unjust enrichment (Count 10).

Opinion and Order, Dkt. No. 2362 at 1-2 (July 22, 2009) (citing SAC ¶¶69-146). Pursuant to Plaintiffs' motion, the Court dismissed Count 9 on May 12, 2009. *See id.* at 2 n.1; Dkt. No. 2042 (May 12, 2009). On July 22, 2009, the Court dismissed "Counts 1, 2 and 10 and the claims for damages asserted in Counts 4, 5 and 6" because the Cherokee Nation is a necessary and

¹ As discussed below, this motion is based upon recent events in the case. Nevertheless, there is no time limit on a motion to strike a jury demand under FRCP 38. *See Jones-Hailey v. Corporation of Tennessee Valley Authority*, 660 F. Supp. 551, 553 (E.D. Tenn. 1987).

indispensable party to those claims. Dkt. No. 2362 at 23.

Accordingly, the claims remaining for trial are: “Counts 3, 7, and 8 and claims for injunctive relief asserted in Counts 4, 5 and 6.” *Id.* As noted above, these remaining claims seek injunctive relief and civil penalties only. *Id.* There are no remaining claims for damages.

I. The Remaining Claims Are Not Subject to a Jury Trial

“Under federal law, ‘the right to a jury trial is not determined by the form of the complaint, but by an appraisal of the claims, defenses, and remedies’ sought.” *Mile High Indus. v. Cohen*, 222 F.3d 845, 856 (10th Cir. 2000) (quoting *Kerr-McGee Corp. v. Bokum Corp.*, 453 F.2d 1067, 1071 (10th Cir. 1972)). Whether or not a particular claim must be submitted to a jury turns on whether the “action involves rights and remedies of the sort traditionally enforced in an action at law, rather than an action in equity.” *Fischer Imaging Corp. v. General Elec. Co.*, 187 F.3d 1165, 1168 (10th Cir. 1999) (quoting *Pernell v. Southall Realty*, 416 U.S. 363, 375 (1974)).

In considering whether the right of trial by jury attaches to a particular claim, the federal courts employ a two-step analysis. *See Fischer*, 187 F.3d at 1168. First, the court asks “whether the cause of action was tried at law in 1791, or is analogous to such a cause of action.” *Id.* This historical inquiry is required because the Seventh Amendment speaks of preserving the right to a jury trial for claims that arise at law (as opposed to equity) as it existed at the time of the Framing.² *See id.* “To determine whether a statutory cause of action is more analogous to cases tried in courts of law than to suits tried in courts of equity or admiralty, [the federal courts] examine both the nature of the statutory action and the remedy sought.” *Id.* (quoting *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998)). “Second, ‘[i]f the action in

² The Seventh Amendment provides that “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” U.S. Const., Amend VII.

question belongs in the law category, [the courts] then ask whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791,” or whether the decision can be made by the court without changing the rights as they existed at that time. *Id.* (quoting *City of Monterey v. Del Monte Dunes At Monterey, Ltd.*, 526 U.S. 687, 719 (1999) (internal quotations omitted)).

The federal courts have noted that this general test can be difficult to apply in practice. *See Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 299 F.3d 643, 648-49 (7th Cir. 2002). However, the application of these principles to this case is clear because the federal courts have repeatedly addressed the type of claims at issue and have held that these claims are not subject to a jury trial.

A. Plaintiffs’ Claims for Injunctive Relief Under Nuisance and Trespass (Counts 4, 5, & 6) Are Not Subject to a Jury Trial

This Court has made clear that Plaintiffs’ remaining claims under Counts 4, 5 and 6 seek injunctive relief and not damages. *See* Opinion and Order, Dkt. No. 2362 at 23. The United States Supreme Court has stated that it is “settled law” that the right to trial by jury does not apply to claims seeking only injunctive relief. *Del Monte Dunes*, 526 U.S. at 719; *see also Marseilles* 299 F.3d at 648. This rule includes “suits brought for an injunction to suppress and abate a public nuisance.” *Balch v. State*, 65 Okla. 146, 148, 164 P. 776, 777 (Okla. 1917); *see also Conner v. City of Santa Ana*, 897 F.2d 1487, 1493 (9th Cir. 1990) (holding that, in a civil “proceeding to abate a nuisance ... a jury was not required.”). In short, “[t]here is no right to a jury trial ... [for claims where] the plaintiffs seek purely equitable relief such as an injunction.” *CBS Broad., Inc. v. EchoStar Comms. Corp.*, 450 F.3d 505, 517-18 n.25 (11th Cir. 2006) (citing *Ford v. Citizens & S. Nat’l Bank*, 928 F.2d 1118, 1121-22 (11th Cir. 1991)). A request for attorneys fees or costs of litigation does not change this result, nor does the fact that an

injunction may require the defendant to expend money to fulfill its mandate. *See id.* (citing *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 n.3 (5th Cir. 1980)); *see also N.A.A.C.P. v. A.A. Arms, Inc.*, 2003 WL 1049011, at *5-6 (E.D.N.Y. February 24, 2003) (In a public nuisance case, “[t]he possible payment of funds to insure that the terms of the injunction are implemented does not convert this equitable claim to one legal in nature or necessitate a jury trial.”).

This well-established rule flows from the Supreme Court’s admonition that, in applying the historical comparison discussed above, the nature of the remedy that the Plaintiff seeks is the more important factor to be considered. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). Because an injunction is an equitable remedy, claims which seek an injunction are appropriately tried to the Court, and not to a jury. *See Mile High Indus. v. Cohen*, 222 F.3d 845, 856 (10th Cir. 2000) (“[T]he Seventh Amendment right to a jury trial attaches to actions at law, not to those in equity.”); *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir. 1995) (“[T]he Seventh Amendment does not apply to actions which involve only equitable rights or which traditionally arose in equity.”); *Manning v. United States*, 146 F.3d 808, 811-12 (10th Cir. 1998) (“Actions at law entitle the parties to a jury, but equitable cases do not.”); *N.A.A.C.P. v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 467 (E.D.N.Y. 2003) (“An action to enjoin a public nuisance is equitable in nature.” (collecting cases)).

The rule holding that cases seeking an injunction are not subject to jury trial has been applied so frequently that it is beyond dispute. *See, e.g.*, 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, *Federal Practice & Procedure* § 2308, at 79-80 (2d ed. 1995) (“Actions for injunctions are equitable in nature and were unknown to the common law courts of England or the United States until the merger of law and equity. Because of this history, there is no constitutional right to a jury trial on a claim for an injunction.”) (collecting cases); 50A C.J.S. *Juries* § 47 (“[T]he

parties are not entitled to a jury trial of the issues of fact arising in a proceeding to obtain an injunction. ... Injunctive relief is invariably an equitable remedy, and a demand for civil penalties does not in itself require a jury trial.”). “It is well settled that nuisance claims seeking solely injunctive relief are equitable in nature” and thus not subject to a jury trial. *A.A. Arms*, 2003 WL 1049011, at *5-6.

Finally, the fact that a claim is of a type where a plaintiff could seek damages under different circumstances is immaterial to this analysis. *See Marseilles*, 299 F.3d at 648. Thus, the fact that Plaintiffs originally sought a damage award in this case does not change the result set forth above. *See id.* Rather, because these claims, as narrowed by the parties and the Court, currently seek an injunction and not damages, the parties have no right to a jury trial. *See id.* (“If the only relief sought is equitable, such as an injunction ... neither the party seeking that relief nor the party opposing it is entitled to a jury trial.”) (citing *United States v. Louisiana*, 339 U.S. 699, 706 (1950); *Great American Federal Savings & Loan Ass’n v. Novotny*, 442 U.S. 366, 374-75 (1979); *Townsend v. Indiana University*, 995 F.2d 691, 693 (7th Cir. 1993); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1254 (7th Cir. 1993)).

B. Plaintiffs’ RCRA Claim (Count 3) Is Not Subject to a Jury Trial

Similarly, it is well settled that a RCRA claim is to be tried to the Court, and not a jury. *See Metal Processing Co., Inc. v. Amoco Oil Co.*, 173 F.R.D. 244, 247 (E.D. Wis. 1997). The federal courts have uniformly held that there is no right to a jury trial for claims brought under RCRA’s citizen suit provisions, such as the claim in this case. *See United States v. N.E. Pharm. & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1986); *Metal Processing Co.*, 173 F.R.D. at 247; *Dublin Scarboro Imp. Ass’n v. Harford County, Md.*, 678 F. Supp. 129, 132 (D. Md. 1988) (“[T]he Seventh Amendment allows no jury trial in citizen suits under ... [section 7002 of

RCRA].”); *Eastman v. Brunswick Coal & Lumber Co.*, 1996 WL 911200, *14 (D. Me., Apr 19, 1996). Even though RCRA provides for civil penalties in some types of cases, *see* 42 U.S.C. § 6928(g), these penalties are in the nature of restitution or disgorgement of any unjust enrichment that the defendant allegedly obtained by the improper disposal of solid waste. *See Metal Processing Co.*, 173 F.R.D. at 247. Accordingly, the courts have established that these civil penalties are equitable in nature, and do not create a right to a jury trial. *See N.E. Pharm.*, 810 F.2d at 749; *Metal Processing Co.*, 173 F.R.D. at 247; *Dublin*, 678 F.Supp. at 132.³

C. Plaintiffs’ Claims for an Injunction and Civil Penalties Under State Agricultural and Environmental Statutes (Counts 7 & 8) Are Not Subject to a Jury Trial

Plaintiffs’ claims under Counts 7 and 8 are also subject to a bench trial. It is clear that these modern statutes were not part of the law in 1791. Accordingly, the analysis of whether they invoke the Seventh Amendment right to a jury trial turns on whether the claims can be analogized to an ancient equitable or common-law claim; and, most important, the nature of the relief requested. *See Chauffeurs*, 494 U.S. at 565; *Marseilles*, 299 F.3d at 648-49.

First, it is clear that the fact that these statutes seek a monetary award does not mean that

³ The SAC requests civil penalties under RCRA, *see* SAC ¶96, but Plaintiffs are not entitled to pursue such penalties here, where their claims rest on the allegation of an imminent and substantial endangerment under RCRA’s citizen-suit provision, 42 U.S.C. § 6972(a)(1)(b). *See, e.g., Herndandez v. Esso Standard Oil Co.*, 599 F. Supp. 2d 175 (D. P.R. 2009); *Village of Riverdale v. 138th Street Joint Venture*, 527 F. Supp. 2d 760, 768 (N.D. Ill. 2007) (no penalties available under 42 U.S.C. § 6972(a)(1)(B)); *College Park Holdings, LLC v. Racetrac Petroleum, Inc.*, 239 F. Supp. 2d 1334, 1348-49 (N.D. Ga. 2002); *Commerce Holding Co. v. Buckstone*, 749 F. Supp. 441, 445 (E.D.N.Y. 1990) (“civil penalties are not available to a citizen-plaintiff in an action brought under § 6972(a)(1)(B)”) (citing 42 U.S.C. § 6972(a)); *Coburn v. Sun Chem. Corp.*, 28 Env’t Rep. Cas. 1665, 1988 WL 120739, slip op. at 8 (E.D. Pa. Nov. 9, 1988).

Even assuming for the sake of argument that Plaintiffs could seek civil penalties under RCRA, however, these penalties are in the nature of restitution or disgorgement of any unjust enrichment that the defendant allegedly obtained by the improper disposal of solid waste. *Metal Processing Co.*, 173 F.R.D. at 247. Accordingly, the courts have said that these civil penalties are equitable in nature, and do not create a right to a jury trial. *N.E. Pharm.*, 810 F.2d at 749; *Metal Processing Co.*, 173 F.R.D. at 247; *Dublin*, 678 F. Supp. at 132.

the claims are “legal” rather than “equitable” for purposes of determining the right to a jury trial. The Supreme Court has made clear that monetary relief may be either “legal” or “equitable.” *See Chauffeurs*, 494 U.S. at 568-70. If the money sought resembles an equitable award, such as penalties that are restitutionary in nature or that resemble disgorgement of profits, the award is properly characterized as equitable relief that is not subject to a jury trial. *See id.* at 570-72 (citing *Tull v. United States*, 481 U.S. 412, 424 (1987)).

Second, the Supreme Court has recently clarified that “a monetary award ‘incidental to or inter-twined with injunctive relief’ may be equitable.” *Id.* at 571. Third, the Supreme Court has also said that the court should consider whether the legislature indicated an intent that the money remedies made available by statute are equitable. *See id.* at 572 (noting that awards under Title VII may be equitable because Congress indicated that intent).

There are no cases interpreting whether the statutes cited in Counts 7 and 8 of the SAC invoke the right to a jury trial, but all of these factors indicate that Plaintiffs’ claims in this case are equitable. Plaintiffs primarily request an injunction to prevent alleged pollution of the IRW and to remediate alleged past pollution. The penalties Plaintiffs seek are inter-twined with that request. To this point, the Court should note that during the four and one half year pendency of this case, Plaintiffs have never specified the amount of any penalties sought in Counts 7 & 8, nor have produced any expert or agency report that purports to quantify any such penalties. Plaintiffs’ claim for “penalties” in Counts 7 and 8 appear to have been an embellishment in pleading their overly broad complaint which has received absolutely no attention in the preparation of Plaintiffs’ claims for trial. Moreover, the Oklahoma legislature indicated that it intended the remedies provided in the state statutes cited in Counts 7 and 8 to be equitable.

1. Count 7: 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18.1

In Count 7, Plaintiffs allege violations of both 27A Okla. Stat. § 2-6-105(A) and 2 Okla.

Stat. § 2-18.1.⁴ In requesting relief under these provisions, Plaintiffs alleged the following:

Pursuant to 27A Okla. Stat. § 2-3-504 and 2 Okla. Stat. § 2-16, the State of Oklahoma is entitled to an assessment of civil penalties against the Poultry Integrator Defendants for each respective violation together with attorneys fees and costs associated with the collection of such civil penalties, injunctive relief against the Poultry Integrator Defendants compelling compliance with 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1, respectively, and all such other relief as may be provided for under the law.

SAC ¶131.

a. 27A Okla. Stat. § 2-3-504

The remedies for a violation of 27A Okla. Stat. § 2-6-105(A) are set forth in 27A Okla. Stat. § 2-3-504, which provides for a civil penalty of not more than \$10,000 for each violation. Importantly, this statute expressly assigns to the Court the authority to “determine” the action, and not a jury. 27A Okla. Stat. § 2-3-504(F)(2). Once the Court has determined that there has been a violation, the statute sets out a variety of equitable remedies, including civil penalties. *See id.* (“The court shall have jurisdiction to determine said action, and to grant the necessary or appropriate relief, including but not limited to mandatory or prohibitive injunctive relief, interim equitable relief....”).

If the Court elects to impose a civil penalty, statute provides that “in determining the amount of a civil penalty *“the court shall consider”* a number of equitable factors “such ... as the nature, circumstances and gravity of the violation or violations, the economic benefit, if any, resulting to the defendant from the violation, the history of such violations, any good faith efforts

⁴ In full, Count 7 alleges violations of the following statutory provisions:

- “It shall be unlawful for any person to cause pollution of any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, land or waters of the state,” 27A Okla. Stat. § 2-6-105(A); *see* SAC ¶¶128-29;
- “It shall be unlawful and a violation of the Oklahoma Agricultural Code for any person to cause pollution of any waters of the state by persons which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food, and Forestry pursuant to the Oklahoma Environmental Quality Act,” 2 Okla. Stat. § 2-18.1(A); *see* SAC ¶130.

to comply with the applicable requirements, the economic impact of the penalty on the defendant, the defendant's degree of culpability, and such other matters as justice may require." 27A Okla. Stat. § 2-3-504(H) (emphasis added). The consideration of the "economic benefit, if any, resulting to the defendant from the violation" closely resembles the remedy of equitable disgorgement. *See Chauffeurs*, 494 U.S. at 570-71 ("[W]e have characterized damages as equitable where they are restitutionary, such as in action[s] for disgorgement of improper profits" (internal quotations omitted)).

b. 2 Okla. Stat. § 2-16

In requesting relief for alleged violations of 2 Okla. Stat. § 2-18.1(A), Plaintiffs rely solely upon 2 Okla. Stat. § 2-16. *See* SAC ¶131.⁵ In full, the relevant part of the statute states:

(B) Any action to redress or restrain a violation of the Oklahoma Agricultural Code, any promulgated rule or any order, license, charter, registration, or permit issued pursuant to the Oklahoma Agricultural Code or to recover any administrative or civil penalty or other fine assessed pursuant to the Oklahoma Agricultural Code, may be brought by:

... (2) The Attorney General on behalf of the State of Oklahoma ...

(C) The court shall have jurisdiction to determine the action, and to grant the necessary or appropriate relief, including but not limited to mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.

2 Okla. Stat. §§ 2-16(B)(2), (C). This statutory text does not provide for the recovery of

⁵ The statutory text of 2 Okla. Stat. § 2-18.1(B) sets forth the guidelines for administrative proceedings to be initiated by the State Board of Agriculture, and expressly references the potential assessment of "an administrative penalty pursuant to Section 2-18 of this title." 2 Okla. Stat. § 2-18.1(B). The statutory provisions in 2 Okla. Stat. § 2-18 lists certain requirements for such administrative proceedings, including "notice and opportunity for a hearing in accordance with the Administrative Procedures Act." 2 Okla. Stat. § 2-18(A). The statutory provisions in 2 Okla. Stat. § 2-18 also set forth the forms of relief available pursuant to the penalty provisions therein, including administrative penalties ("of not less than One Hundred Dollars (\$100.00) and not more than Ten Thousand Dollars (\$10,000.00) for each violation"), interest, attorneys fees and costs. *See* 2 Okla. Stat. §§ 2-18(A), (E). However, Plaintiffs have neither alleged/requested relief pursuant to 2 Okla. Stat. § 2-18, nor followed the required procedures set forth therein. Accordingly, recovery of penalties or fines under 2 Okla. Stat. § 2-18 is not available.

statutory penalties, including civil or administrative penalties.

Like 27A Okla. Stat. § 2-3-504, the Oklahoma Legislature has directed that the Court, not a jury, shall “determine the action” brought under 2 Okla. Stat. § 2-18.1(A). 2 Okla. Stat. §§ 2-16(B)(2), (C). Moreover, the only relief available to Plaintiffs under this statute is injunctive. *See id.* Although Subsection (B) allows the Attorney General to use this provision to recover any pre-existing administrative or civil penalty that has been assessed under the Oklahoma Agricultural Code, there have been no administrative proceedings to assign any fines or penalties to the underlying conduct in this case. Accordingly, the injunctive provisions of this statute are the only potential remedy.⁶

c. Count 8: Oklahoma Registered Poultry Feeding Operations Act

In Count 8, Plaintiffs allege violations of multiple statutory provisions and regulations set forth in accordance with the Oklahoma Registered Poultry Feeding Operations Act (“RPFO Act”).⁷ In requesting relief under these provisions, Plaintiffs allege the following:

⁶ The fact that the Oklahoma Legislature assigned some violations of statutes and regulations to administrative proceedings, rather than to a jury trial, does not offend the Seventh Amendment. The Supreme Court has repeatedly recognized that the legislature may elect to create new types of claims and assign them to adjudication by administrative bodies with specialized expertise. *See, e.g., Chauffeurs*, 494 U.S. at 565, n.4 (citing *Granfinanciera*, 492 U.S. at 42, n. 4); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 460-61 (1977); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 21, 24 (1937).

⁷ In *Plaintiffs’ Response in Opposition to Defendants’ Joint Motion for Summary Judgment on Counts 7 & 8*, Plaintiffs asserted alleged violations of the following provisions of the RPFO Act:

(1) that land-applied poultry waste “create[s] an environmental or a public health hazard,” *see* 2 Okla. Stat. § 10-9.7(B)(4)(a); (2) that land-applied poultry waste “result[s] in the contamination of waters of the state,” *see* 2 Okla. Stat. § 10-9.7(B)(4)(b); (3) that there is “runoff of waste from the application site,” *see* 2 Okla. Stat. § 10-9.7(C)(6)(c); (4) that there is “[r]unoff of poultry waste from the application site,” *see* Okla. Admin. Code § 35:17-5-5(a)(7)(C); (5) that “land application of poultry waste . . . cause[s] . . . runoff of significant pollutants to waters of the State,” *see* Okla. Admin. Code § 35:17-5-5(c) and (6) that “land application of poultry waste . . . cause[s] a water quality violation to waters of the State,” *see* Okla. Admin. Code § 35:17-5-5(c).

Pursuant to 2 Okla. Stat. § 10-9.11, the State of Oklahoma is entitled to an assessment of civil penalties against the Poultry Integrator Defendants for each violation together with attorneys fees and costs associated with the collection of such civil penalties, injunctive relief against the Poultry Integrator Defendants compelling compliance with the Animal Waste Management Plan criteria set forth in the Oklahoma Registered Poultry Feeding Operations Act, 2 Okla. Stat. § 10-9.7, and with the Oklahoma Administrative Code, § 35:17-5-5, and all such other relief as may be provided for under the law.

SAC ¶135.

However, none of the penalties Plaintiffs request under the RFRO Act are available in this case. The RFRO Act's penalty provisions provide for the recovery of "criminal penalties" and "an administrative penalty," but do not provide for the recovery of civil penalties. 2 Okla. Stat. §§ 10-9.11(A), (B). Plaintiffs likely cannot recover "criminal penalties" under 2 Okla. Stat. § 10-9.11(A)(1), because the current proceedings are civil, not criminal.⁸ Plaintiffs also cannot recover "administrative penalties" under 2 Okla. Stat. § 10-9.11(B). In relevant part, the statute states:

(B) (1) In addition to the criminal penalties specified by this section, the State Department of Agriculture may: (a) assess an administrative penalty of not more than Two Hundred Dollars (\$ 200.00) per day of noncompliance.

2 Okla. Stat. § 10-9.11(B)(1)(a). With respect to the assessment of administrative penalties, the statute also provides that:

Any action for ... *recovery of any administrative penalty assessed* pursuant to the Oklahoma Registered Poultry Feeding Operations Act may be brought by: ... (b) the Attorney General on behalf of the State of Oklahoma.

Dkt. No. 2166 at 22.

⁸ In full, the relevant statutory provisions related to "criminal penalties" states:

(A)(1) Any person violating the provisions of the Oklahoma Registered Poultry Feeding Operations Act shall, upon conviction, be guilty of a misdemeanor and may be punished by a fine not to exceed Two Hundred Dollars (\$200.00).

2 Okla. Stat. § 10-9.11(A)(1).

2 Okla. Stat. § 10-9.11(C)(1)(b) (emphasis added); *see* 2 Okla. Stat. § 10-9.11(B)(3) (referring to “assessment of penalties in an administrative enforcement proceeding”). A plain reading of these statutory provisions indicates that Plaintiffs cannot recover administrative penalties because such penalties were not assessed by the “State Department of Agriculture” in “an administrative enforcement proceeding.”

The penalty provisions expressly state that it is within the Court’s discretion to grant injunctive relief. *See* 2 Okla. Stat. § 10-9.11(B)(2) (“A district court may grant injunctive relief to prevent a violation of, or to compel compliance with, any of the provisions of the Oklahoma Registered Poultry Feeding Operations Act or any rule promulgated thereunder or order, registrations and certificates issued pursuant to the Oklahoma Registered Poultry Feeding Operations Act.”); 2 Okla. Stat. § 10-9.11(C)(2) (“[t]he court shall have jurisdiction to determine said action, and to grant the necessary or appropriate relief, including but not limited to *mandatory or prohibitive injunctive relief*” (emphasis added)); *see also* 2 Okla. Stat. § 10-9.11(C)(1)(b) (authorizing Attorney General to bring civil action for injunction).

2 Okla. Stat. § 10-9.11(C)(2) states that “[t]he court shall have jurisdiction to determine said action, and to grant the necessary or appropriate relief, including but not limited to mandatory or prohibitive injunctive relief, interim equitable relief, and punitive damages.” *Id.*

II. A Bench Trial Will Conserve Substantial Time and Resources

Clarification from the Court that it will try the Plaintiffs’ remaining claims in a bench trial rather than a jury trial will streamline the pretrial proceedings for the Court and the parties in the coming weeks. For example, if the case is to be tried to a jury, the parties would likely raise numerous issues relating to jury selection, including a request that the Court approve and mail a written questionnaire to the potential jurors. Regardless of whether a questionnaire is utilized, the jury would need to be selected through voir dire. Also, the parties would likely file

a much larger number of motions in limine, in light of the heightened prejudice when inadmissible information is presented to a layperson.

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